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No. 98-1715

In the Supreme Court of the United States

ROBERT R. KRILICH, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1014—which prohibits, *inter alia*, any false statement for the purpose of influencing the action of a federally insured bank on any application, advance, commitment, or loan—prohibits a false statement in an application for the disbursement of funds held in trust by a covered bank in an interest-bearing account, where the bank could be liable for disbursing the funds in violation of the trust agreement.

2. Whether the district court reasonably admitted petitioner's plea proffer statements in light of his prior agreement that the government could introduce those statements in rebuttal if he presented a position inconsistent with the proffer at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 159 F.3d 1020. The court's order denying petitioner's petition for rehearing and suggestion for rehearing en banc (Pet. App. 22a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1998. A petition for rehearing was denied on January 26, 1999 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on April 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted in the United States District Court for the Northern District of Illinois on 14 counts of making false statements to a federally insured bank, in violation of 18 U.S.C. 1014, and on one count of conspiring to violate the Racketeer Influenced and Corrupt Organizations (RICO) Act, in violation of 18 U.S.C. 1962(d). Pet. 5-6. The jury also returned a criminal forfeiture verdict. Petitioner was sentenced to 64 months' imprisonment and ordered to pay a $1 million fine. He forfeited assets totaling $8,670,097.62. Gov't C.A. Br. Appx. 1. He appealed his convictions, and the government cross-appealed the sentence. The court of appeals affirmed the convictions, vacated the judgment, and remanded for resentencing. Pet. App. 20a.

1. a. In 1985, petitioner, a real estate developer, financed several construction projects with funds derived from municipally sponsored tax-exempt bonds known as Industrial Revenue Bonds (IRBs). The interest on IRBs is exempt from federal tax. For that reason, investors accept a lower return than on taxable investments, and the developer is able to borrow the funds at a below-market rate. Gov't C.A. Br. 2. Once a local unit of government approves the issuance of IRBs, they are sold to investors and the proceeds are placed with trustees. The trustee holds the money and invests it in an interest-earning account until the developer needs it to build the project. From the interest earned on the proceeds, the investors are paid a set rate of return, and any excess amounts, referred to as "arbitrage," may be used by the developer for costs directly related to the project for which the money was obtained. In this case, the trustee banks for the bond

proceeds and arbitrage funds were the First Tennessee Bank National Association and the LaSalle National Bank, which are both federally insured financial institutions. Gov't C.A. Br. 9-10; Tr. 597; Trial Stipulation No. 5.[1]

Tax and legal requirements, as well as the bond agreements, specifically limited the uses of the initial bond proceeds as well as the arbitrage funds. The restrictions served to protect the investors and to ensure the bonds' tax-free status. To obtain disbursements of arbitrage funds, petitioner had to submit written requisitions to the trustee banks identifying who and how much was to be paid. Petitioner also had to certify to the trustee and bond counsel that the costs were properly incurred for the particular project for which the bonds were initially issued, that the costs had not been the subject of a prior disbursement, and that 90% of the funds used thus far had been used for "good costs," as defined in the bond indenture. Based on the statements in the requisitions and certifications, the bank would disburse the funds either to petitioner or to the vendor listed. The banks relied on the truth of the statements made in those requisitions and certifications in disbursing the arbitrage funds. The banks could be liable if money was paid for costs not covered under the bond indenture or if funds were expended in excess of the tax code's limits. Gov't C.A. Br. 10- 11; Tr. 570-571.

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[1] The parties stipulated at trial that "First Tennessee * * * is insured by the Federal Deposit Insurance Corporation" (Trial Stipulation No. 5) and, similarly, that "the funds and deposits on hold by LaSalle National Bank were insured by the [FDIC]" (Tr. 597). The record does not reveal whether the individual trust accounts at issue were themselves so insured. That factual issue is irrelevant to the questions presented here, and petitioner presents no argument to the contrary.

With respect to each of the bond projects, petitioner caused false invoices and certifications to be submitted to the trustee banks to obtain arbitrage funds for impermissible purposes, such as a progress payment on his yacht, the purchase of a Corvette, and the payment of other expenses unrelated to the particular development projects for which the bonds had been issued. Gov't C.A. Br. 2-3, 11-12; Pet. App. 3a. Petitioner's role in the falsification of those invoices and certifications formed the basis of his convictions under 18 U.S.C. 1014.

b. Petitioner's separate conviction for RICO conspiracy was based on several acts of bribery and mail fraud. Gov't C.A. Br. 3-9. In 1983, petitioner paid a local mayor $5000 to obtain a zoning change covering petitioner's land without involving the zoning board of appeals or the city council. *Id.* at 3-4. The change was made by substituting a new plat, which came to be known as "Exhibit C," for petitioner's original plat. The change required the signatures of both the mayor and the city clerk. Although the city clerk repeatedly refused to sign the necessary papers legitimizing the new plat because the required procedures had not been followed, the mayor completed the deal by having the deputy city clerk sign the plat while the city clerk herself was on vacation. *Id.* at 4.

In 1984, petitioner agreed to pay the same mayor $40,000 to arrange for his municipality to sponsor the issuance of IRBs to finance one of petitioner's development projects. Petitioner concealed the bribe by arranging for the mayor's son, Andy Sarallo, to win a $40,000 prize in a staged (and insured) hole-in-one golf contest. On June 19, 1985, petitioner met with the mayor and his sons and assured them that Sarallo would win the prize on the ninth hole, the site of the

contest. In keeping with applicable insurance requirements, there were two spotters at the ninth hole: John Hilgenberg, an employee of the golf course, at the tee, and Kim Plencner, one of petitioner's employees, at the green. Before Andy Sarallo's golf foursome reached the ninth hole, petitioner instructed Hilgenberg to leave for lunch. As the foursome approached the hole, petitioner obtained one of Sarallo's golf balls and instructed him and his companions to start screaming after Sarallo had teed off, as if he had made the hole-in-one. Petitioner then went to the ninth green and dropped the ball in the hole. The members of Sarallo's foursome and the "spotters" (petitioner and Kim Plencner) falsely acted as if a hole-in-one had actually been made, even though Sarallo's ball never reached the green. Sarallo was then awarded the $40,000 prize, an amount that petitioner fraudulently recovered from a special contest-related insurance policy. Gov't C.A. Br. 4-6; Pet. App. 2a-3a.

2. During the pre-indictment investigation, petitioner met with the government in an attempt to negotiate a plea. Petitioner read and signed a proffer agreement in which the government agreed that it would not use the information he provided in the government's case-in-chief. Gov't C.A. Br. 14. The agreement went on to provide, however, that if petitioner

> should subsequently testify contrary to the substance of the proffer or otherwise present a position inconsistent with the proffer, nothing shall prevent the government from using the substance of the proffer at sentencing for any purpose, at trial for impeachment or in rebuttal testimony, or in a prosecution for perjury.

Pet. App. 4a. During the proffer interviews, petitioner admitted, among other things, bribing the mayor to alter the zoning of his Oakbrook Terrace property, staging the hole-in-one contest,[2] and instructing his employees and third-party vendors to submit false invoices to the banks in order to obtain the arbitrage funds. Gov't C.A. Br. 14-15.

During the trial, the court found that petitioner had opened the door to the admission of these proffer statements because he had presented a position inconsistent with them through his cross-examination of government witnesses and through the presentation of his own witnesses.[3] For example, petitioner elicited testimony

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[2] Specifically, petitioner admitted that, during the golf contest, he left his own golf foursome and met Andy Sarallo's foursome on the ninth tee and obtained Sarallo's golf ball. Petitioner stated that he dropped the ball in the ninth hole when Sarallo swung, and he then retrieved the ball and held it in the air as a signal for Sarallo's foursome to jump up and down. Gov't C.A. Br. 14-15.

[3] At trial, petitioner primarily argued that the court should not consider any testimony elicited on cross-examination of government witnesses in determining whether he had presented a position inconsistent with the proffer. The district court rejected that argument. It reasoned:

> What is the practical difference between evidence offered by the defendant in his own case and evidence elicited by the defendant from the government's witnesses on cross examination? Evidence is evidence. I don't tell the jury that they should not consider in the defendant's favor any evidence elicited on his cross examination of the defendant's witnesses. Clearly that is not the law. It frequently happens * * * that the strongest evidence a defendant may present is that presented through the government witnesses on their cross examination.

Tr. 2369-2370. Petitioner does not contest that ruling in this Court.

from Kerry Plencner, his company vice-president, that he was unaware that petitioner had paid any bribes to any public official in connection with any project. Tr. 339. Similarly, petitioner elicited testimony that there were no irregularities in the procedures followed in altering the zoning, Tr. 990, 992, 1029-1030, 1033, and that no bribe was necessary for the substitution of the plat known as Exhibit C because the city attorney believed the new zoning to be proper, Tr. 982-983, 991, 1016, 1960-1963.

Petitioner also sought to establish that a legitimate hole-in-one had occurred. He elicited testimony from Kerry Plencner, who was in Andy Sarallo's foursome, and from Marty McClain, who was in the foursome at the preceding hole, that they did not recall petitioner being at the ninth hole at the time Sarallo supposedly hit the hole-in-one. Tr. 329, 1567. McClain further testified that during the contest petitioner was playing golf in the foursome *following* McClain's group (and therefore two foursomes behind Andy Sarallo), Tr. 1561, 1564; that several times petitioner's group caught up to McClain's group and had to wait for that group to finish playing the hole, Tr. 1564-1565; and that petitioner and his group were playing behind McClain's group at the time McClain's group came up to the ninth hole, Tr. 1567. Petitioner also tried to establish, through virtually every witness related to the golf outing, that many people on the golf course and in the clubhouse had a view of the ninth hole, making rigging the hole-in-one all but impossible. Tr. 324-326, 1627, 1367-1371, 1556, 1566.

Finally, petitioner took the position that he had not submitted false invoices to the banks. He elicited testimony that he had no knowledge of the false invoices and that they had been submitted to the banks by one

of petitioner's employees. Tr. 304-318, 370-371, 378-379, 405-406, 443-448, 1382-1401, 2316-2326.

The district court agreed with the government that, under the terms of the proffer agreement, petitioner's trial strategy had opened the door to the admission of the proffer statements. The court reasoned that the defense had elicited substantial testimony in an effort to show that "the Hole-in-One actually occurred," Tr. 2375, that "no bribes were paid" to Sarallo with respect to the plat substitution, *ibid.*, and that petitioner had no knowledge of the false invoices submitted to the bank, Tr. 2388.

3. The court of appeals affirmed petitioner's convictions.[4] On the admissibility of the proffer statements, the court first held that only "genuine inconsistency" between those statements and petitioner's position at trial would justify their introduction, and that "[s]tatements are inconsistent only if the truth of one implies the falsity of the other." Pet. App. 6a. The court held, however, that the district court had "sensibly * * * conclude[d]" that petitioner's position at trial had in fact been inconsistent with the proffer, because the testimony that he elicited affirmatively indicated that he could not have faked the hole-in-one and that he had not bribed the mayor. *Id.* at 7a.[5]

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[4] The court vacated the sentence and remanded for resentencing. Pet. App. 15a-20a.

[5] Petitioner did not dispute on appeal (nor does he dispute now) the district court's ruling that his trial position was inconsistent with his admission, in the proffer, that he had caused false invoices to be submitted to the banks. Petitioner also does not renew his argument, which the court of appeals rejected (Pet. App. 7a-8a), that his conditional waiver was unenforceable on the theory that it was unknowing or involuntary.

Petitioner also argued that his convictions under Section 1014 were invalid on the grounds that the withdrawals of the trust funds were not lending transactions and that Section 1014 applies only to false statements made to obtain loans or other extensions of credit. The court of appeals rejected that argument, relying on the plain language of Section 1014. "The text of the statute," it explained, "is straightforward and broad: it applies to 'any' statement made for the purpose of influencing in 'any' way the action of 'any' of the covered institutions in 'any' application." Pet. App. 12a. The court also observed that Section 1014 specifically covers misstatements to a variety of institutions, such as the Federal Housing Finance Board and the Office of Thrift Supervision, that do not make loans. "If their inclusion in the statute is to have meaning," the court concluded, "then § 1014 *must* cover statements that are not designed to influence an extension of credit." *Id.* at 13a.

Judge Ripple concurred in part and dissented in part. Although he agreed with the majority's analysis and conclusion on the admissibility of the proffer statements (Pet. App. 21a), he would have reversed the Section 1014 convictions on the ground that Section 1014 "applies only to lending activities by the financial institutions protected by the statute." *Id.* at 20a.

ARGUMENT

1. Petitioner contends (Pet. 9-15) that Section 1014 applies only to false statements made to influence lending or other credit transactions by covered institutions. That claim lacks merit and warrants no further review.

a. Section 1014 prohibits, *inter alia*, making "any false statement," for the purpose of "influencing in any way," the action of "any institution the accounts of

which are insured by the Federal Deposit Insurance Corporation," on "any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan." 18 U.S.C. 1014. Petitioner's conduct falls squarely within the scope of that prohibition. He caused "false statement[s]" to be made "for the purpose of influencing" the banks' actions on applications and commitments relating to the disbursement of IRB funds. See, *e.g.*, *United States* v. *Yung Soo Yoo*, 833 F.2d 488, 490 (3d Cir. 1987) (noting broad definition of "commitment" under Section 1014); see also *United States* v. *Tucker*, 773 F.2d 136, 139 (7th Cir. 1985), cert. denied, 478 U.S. 1021, 1022 (1986). As a result of those misrepresentations, those funds were disbursed for purposes inconsistent with the tax-exempt status of the IRBs. Had petitioner told the banks the truth about the uses to which those funds would be put, the banks would have been obligated to deny the disbursements. *E.g.*, Tr. 570, 606. As one bank officer testified at trial, the banks "would certainly be open to liability if [they] paid out money for costs that weren't qualified under the indenture," for the bondholders could be subject to termination of the tax-exempt status of the bonds. Tr. 570.

Petitioner would limit the unqualified language of Section 1014 to false statements made in an application for a loan or credit. See Pet. i (question presented), 4. There is no merit to that position. The statute enumerates a long list of the types of transactions covered, and a loan is only one item on that list. Adopting petitioner's reading would render the other enumerated terms superfluous. See *United States* v. *Pinto*, 646 F.2d 833, 838 (3d Cir.) ("If 'advance' was only to refer to a loan, the term 'advance' would be rendered meaningless."), cert. denied, 454 U.S. 816 (1981); see also

United States v. *Erskine*, 588 F.2d 721, 722 (9th Cir. 1978) (Kennedy, J.) (Section 1014 applies to "a loan or one of the other transactions listed in the statute").[6]

Indeed, if petitioner's construction were correct, there would be no rational explanation for Congress's decision to include, within Section 1014's scope, false statements made to institutions such as the Federal Reserve banks, the Office of Thrift Supervision, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, and the National Credit Union Administration Board. 18 U.S.C. 1014. As the court of appeals observed, "[n]one of these institutions makes loans," and "[i]f their inclusion in the statute is to have meaning, then § 1014 *must* cover statements that are not designed to influence an extension of credit—indeed, must cover statements that have nothing to do with the payment of money." Pet. App. 13a. As this Court recently held in

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[6] In a similar vein, petitioner argues (Pet. 11-13) that the funds at issue in some respect "belong[]" to him and that this ownership interest somehow removes his conduct from the scope of Section 1014. Even if the funds did in fact "belong[]" to him—an unresolved factual issue at trial (*e.g.*, Tr. 145)—petitioner's argument presupposes that Section 1014 encompasses only those transactions in which the bank loans, and directly risks, its own funds. The short answer is that no such limitation appears in the plain language of the statute. See, *e.g.*, *Yung Soo Yoo*, 833 F.2d at 490 & n.2 (rejecting argument that Section 1014 only applies to loans or commitments where the bank's own funds are at risk); see also *Kay* v. *United States*, 303 U.S. 1, 6 (1938) ("actual damage [to the financial institution] is not an ingredient of the offense" under statutory predecessor to Section 1014). For the same reason, petitioner's attempt to distinguish the banks' lending activities from the banks' trust departments (Pet. 11-12 & n.5) is irrelevant to the coverage of this statute.

United States v. *Wells*, 519 U.S. 482, 490 (1997), it is inappropriate to limit the plain scope of Section 1014 with qualifications that do not appear on the face of the statute. Here, petitioner's position not only lacks textual support, but would create unresolvable anomalies in the statute as written.

Petitioner nonetheless argues (Pet. 13-15) that the *title* of Section 1014—"Loan and credit applications generally; renewals and discounts; crop insurance"—overrides and substantially limits the body of the provision's text. That is incorrect. This Court has long adhered "to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947); accord *United States* v. *Minker*, 350 U.S. 179, 185 (1956). "That the heading * * * fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact. That heading is but a short-hand reference to the general subject matter involved." *Brotherhood of R.R. Trainmen*, 331 U.S. at 528.[7]

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[7] *INS* v. *National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) (*NCIR*), is neither "identical to" (Pet. 14) nor even particularly relevant to this case. In *NCIR*, the government acknowledged (and the Court agreed) that the text of the immigration regulation at issue was ambiguous. 502 U.S. at 189. To resolve that ambiguity, the Court looked in part to the title of the regulation, and it also heavily relied on the well-established principle that "an agency's reasonable, consistently held interpretation of its own regulation is entitled to deference." *Id.* at 189-190. Here, by contrast, there is no relevant ambiguity in the plain text of Section 1014, and the principle of deferring to an agency's interpretation of its own regulation is of course inapplicable. Petitioner's reliance (Pet. 13 n.7) on *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998), is also unavailing. There as well,

Finally, there is no merit to petitioner's argument (Pet. 10-13) that the decision below is somehow inconsistent with this Court's decision in *Williams* v. *United States*, 458 U.S. 279 (1982). In *Williams*, the Court held that depositing bad checks does "not involve the making of a 'false statement' [under Section 1014] for a simple reason: technically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.'" *Id.* at 284. The government's argument to the contrary, the Court continued, "slights the wording of the statute." *Id.* at 286 (internal quotation marks omitted). The Court then examined the legislative history to determine whether it would permit a *broader* reading of Section 1014 than what the provision's text would support; it found that such an atextual reading would be unwarranted, because the only applicable legislative history focused on false "representations made in connection with conventional loan or related transactions." *Id.* at 288-289.

Despite petitioner's suggestion to the contrary, that observation does not support *deviating* from the unambiguous statutory language addressing the very different issue presented here. See generally *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991) (ambiguity of one aspect of statute does not render rest of statute ambiguous). Although the legislative history cited by petitioner does focus on "conventional loan or related transactions" (*Williams*, 458 U.S. at 289), this Court has repeatedly held that "it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying

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the Court looked to the title of the statute only because the statute's text was subject to varying interpretations. See *id.* at 229-234.

to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998); see also *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 211-212 (1998).[8]

b. Petitioner argues that this Court should grant certiorari to resolve what he characterizes as a "conflict" (Pet. 15) between the decision below and *United States* v. *Devoll*, 39 F.3d 575, 578 (5th Cir. 1994), cert. denied, 514 U.S. 1067 (1995). We disagree. Although some of the language of *Devoll* is inconsistent with the reasoning of the decision below, no true "conflict" has yet developed that would warrant this Court's intervention.

The defendant in *Devoll* appears to have argued not that his misrepresentations lacked a connection to a lending transaction, but that the district court had committed plain error in failing to instruct the jury that such a connection was an element of the offense. With little analysis, the court held that the district court had committed error and that "section 1014 applies only to actions involving lending transactions." 39 F.3d at 580; see also *United States* v. *McDow*, 27 F.3d 132, 135 (5th

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[8] Petitioner cites one manual of federal jury instructions for the proposition that Section 1014 violations must involve false statements with respect to a bank's lending activities. See 2 Leonard Sand *et al.*, *Modern Federal Jury Instructions* ¶ 37.03, at 37-27, 37-38 (1998). That proposition is incorrect for the reasons discussed above, and other manuals offer pattern instructions for Section 1014 that do not limit the offense to false statements made in connection with loan applications. See, *e.g.*, 1st Cir. Pattern Jury Instructions (Crim.) § 4.09, at 71 (1998); 7th Cir. Crim. Jury Instructions 252 (1999); 8th Cir. Manual of Model Jury Instructions (Crim.) § 6.18.1014, at 239 (1996); 11th Cir. Pattern Jury Instructions No. 34, at 190 (1997).

Cir. 1994) (stating in dictum that Section 1014 requires proof of intent to influence "a federally insured institution engaged in lending activity," but reversing conviction on other grounds). The *Devoll* court nonetheless affirmed the defendant's conviction. It found that the error (to which the defendant had not objected) was not "plain" and that, in any event, it did not affect his substantial rights, because there was "ample evidence" that his false statements did in fact arise in the context of lending activities. 39 F.3d at 581. Petitioner cites no case, and we are aware of none, in which a court of appeals has actually reversed a conviction or dismissed an indictment on the ground that Section 1014 is limited to lending activities.[9]

Nor is it at all clear that the Fifth Circuit would find Section 1014 inapplicable on the peculiar facts of this

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[9] *United States* v. *Krown*, 675 F.2d 46 (2d Cir.), cert. denied, 459 U.S. 839 (1982), which petitioner cites in a footnote (Pet. 13 n.6), is inapposite. In *Krown*, the court reversed the defendants' convictions under Section 1014 for writing worthless checks. (As noted above, this Court subsequently addressed in *Williams* the applicability of Section 1014 to such conduct and resolved the issue on grounds that are irrelevant to the question presented here. See p. 13, *supra*.) Although the *Krown* court stated in passing that the statutory terms "application" and "commitment" "can only refer to an application or commitment involving an advance or loan or other credit transaction listed in the statute," 675 F.2d at 51, the court based its holding principally on the observation that no actual funds had been withdrawn from the bank in question. *Ibid.* Indeed, the court distinguished one of the cases cited by the government—*United States* v. *Stoddart*, 574 F.2d 1050 (10th Cir. 1978)—solely on the ground that it "involved an agreement by a bank to permit a withdrawal from an account following a fraudulent representation to the bank by the depositor." *Krown*, 675 F.2d at 51. Here, of course, petitioner *did* obtain large sums of money following "fraudulent representation[s]" that he contrived.

case.[10] As its opinion suggests, the Fifth Circuit was principally concerned with avoiding application of Section 1014 in cases involving "fraud or false representations having nothing to do with financial transactions, such as fraud in an employment contract or, for example, in a contract to provide goods or services for custodial care, premises repair, or renovation." 39 F.3d at 580. This is not such a case. Petitioner made false statements in applications for the disbursement of trust funds administered by banks and held in interest-bearing accounts, and the banks could be held liable if they disbursed the funds in violation of the terms of the trust. Petitioner's conduct plainly involved "financial transactions" (*ibid.*), and it violated the statutory purpose of insulating such transactions from false statements intended to influence the institution's conduct. Indeed, even if the statute were construed (as petitioner proposes) to exclude "transactions unrelated to loans or other extensions of credit" (Pet. i), this case would fall *within* that articulation of the scope of Section 1014, because it does in fact involve "borrowed funds" (Pet. 5): *i.e.*, funds borrowed from the issuers of the IRBs. Although the bank was not itself the lender, it played a central role in implementing the lending arrangement and took on financial exposure for improper release of the funds (see pp. 3, 10, *supra*).

In short, there is no clear conflict between the Fifth and Seventh Circuits on the proper application of Section 1014, and even if there were such a conflict, this

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[10] *Devoll* predates this Court's decision in *Wells*, which reaffirms that the plain language of Section 1014 should be given its full effect. See 519 U.S. at 490. *Devoll* is subject to reconsideration on that ground alone.

case, with its complex factual setting, would be a poor vehicle for attempting to resolve it.

2. Petitioner separately challenges his RICO conviction on the ground that portions of his plea proffer were improperly admitted at trial. Pet. 15-20. He no longer appears to dispute that he executed a valid conditional waiver of his right, under Rule 11(e)(6) of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence, to exclude evidence of the proffer. See generally *United States* v. *Mezzanatto*, 513 U.S. 196 (1995). Instead, he argues that the district court erred in finding that he triggered the waiver by "present[ing] a position inconsistent" with his proffer at trial (Pet. App. 4a). In particular, he argues that his trial positions, while "cast[ing] doubt on the prosecutors' case," were "not inconsistent with an admission that the crime occurred." Pet. 17; see also Pet. 18 ("The defense did not assert that the hole-in-one scheme never took place."); Pet. 19 ("Testimony that the corporate vice-president was unaware of bribes was not 'inconsistent' with the proffer, nor was evidence that the city attorney thought the rezoning proper and that the procedures followed in the rezoning were not unusual.").

The court of appeals' disposition of that factual dispute warrants no further review. The court gave petitioner's waiver "neither a stingy reading nor a generous one, but a natural reading, which leaves the parties in control through their choice of language." Pet. App. 4a. The court acknowledged that "[i]mpeachment of a witness need not be 'contrary to' or 'inconsistent with' a defendant's admission of guilt in a bargaining proffer," and it affirmed that "[s]tatements are inconsistent only if the truth of one implies the falsity of the other." *Id.* at 6a. Petitioner does not argue

otherwise, and it is difficult to discern any difference between the court's legal standard and the legal standard that petitioner would apply. Petitioner's only true quarrel is with the application of that standard to the facts of this case—*i.e.*, with the court of appeals' conclusion that it was "sensibl[e]" for the district court to conclude that, at trial, petitioner went "well beyond casting doubt on the prosecutor's evidence" and in fact "advance[d] a position inconsistent with the evidence." *Id.* at 7a. Petitioner's arguments on that point are factbound and, for the reasons identified by the court of appeals (*id.* at 6a-7a), without merit. As that court found, the testimony that petitioner elicited at trial, in part through his own witnesses, was plainly designed to convey a message of actual innocence that was inconsistent with his proffer statements.

Petitioner is mistaken in asserting that the decision below conflicts with the position taken by "a majority of this Court" (Pet. 16) in *Mezzanatto*. In that case, the defendant waived his rights under the Federal Rules by agreeing that statements he made during a proffer session "could be used to impeach any contradictory testimony he might give at trial if the case proceeded that far." 513 U.S. at 198. This Court sustained the waiver, holding that defendants may enter into enforceable waivers of the federal provisions barring admission of statements made in the course of plea discussions. *Id.* at 200-211. The *Mezzanatto* concurrence did not say, as petitioner suggests, that implied waivers must be "carefully limited" or that any particular category of waivers would be "impermissible" (Pet. 16). The concurrence said only that "[i]t may be" true as an empirical matter that it "would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining," if a waiver permitted the use

of a defendant's statements "in the case in chief," *Mezzanotto*, 513 U.S. at 211 (Ginsburg, J., concurring), a question that the concurrence did not reach because the facts of the case did not present it. Petitioner offers no support for the proposition that the kind of conditional waiver at issue here in fact has such an effect. Moreover, petitioner's one-sided view of the plea-bargaining process overlooks the concern, which this Court recognized in *Mezzanotto*, that enforcement of waiver agreements is often necessary to give *prosecutors* an incentive "to enter into cooperation discussions in the first place." *Id.* at 207; see also Pet. App. 4a-6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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